Sentencing Guidelines

Recent Ninth Circuit Case Law Addressing Selected Frequently Raised Sentencing Issues

Compiled: January, 2001; Updated: January 2004
The Chambers of The Honorable Malcolm F. Marsh

I. USSG CHAPTER 1

A. Relevant Conduct

The overall policy of the Guidelines is to punish a defendant for all harm that resulted from his actions. See United States v. Reese, 2 F.3d 870, 894-95 (9th Cir. 1993).[1] Activity that constitutes the "same course of conduct" or which forms part of a "common scheme or plan" falls within the definition of relevant conduct. USSG 1B1.3. In determining whether particular acts (such as individual acts of drug distribution) fall within the definition of "relevant conduct" the court should consider: **similarity, regularity** and **temporal proximity.** United States v. Hahn, 960 F.2d 903, 910 (9th Cir. 1992).[2] The Ninth Circuit explained that each of these three factors should be considered on a sliding scale; that is, where temporal proximity is weak, the court should look for a stronger showing of similarity and regularity. Id. at 911.[3]

The government bears the burden of establishing relevant conduct by a preponderance of the evidence. United States v. Seesing, 234 F.3d 456, 459 (9th Cir. 2001). This burden is met if "relevant facts [are] shown to be more likely true than not." Id.

Relevant conduct in a conspiracy case includes all actions of the conspiracy that are **reasonably foreseeable** to the defendant: the court must first determine the scope of conspiracy and then examine what was reasonably foreseeable to a particular defendant. Each defendant and his/her role must be examined separately. See Seesing, 234 F.3d at

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[1] However, relevant conduct may not be used to determine the most applicable guideline provision. The court (and PSR) must focus solely upon the charge contained in the indictment in determining the applicable guideline; relevant conduct considerations only come into play AFTER that initial determination is made. United States v. Takahashi, 205 F.3d 1161 (9th Cir. 2000) (as applied to a § 846 drug conspiracy conviction); United States v. Crawford, 185 F.3d 1024 (9th Cir. 1999) (as applied to a § 841 drug distribution conviction).

[2] The Hahn test is still the central inquiry. See United States v. King, 200 F.3d 1207 (9th Cir. 1999) (applying Hahn); and United States v. Rose, 20 F.3d 367, 370 (9th Cir. 1994) (same).

[3] A 4-5 year lapse between incidents has been held to be too remote to constitute relevant conduct absent evidence of any illicit conduct in the interim: United States v. Wall, 180 F.3d 641 (5th Cir. 1999). However, if there is an explanation for the time lapse, two temporally remote incidents may fall within relevant conduct: see e.g. United States v. Jackson, 161 F.3d 24 (D.C. Cir. 1998) (affirming 4-year lapse where delay attributable to unavailability of supplier and delay inherent in particularly large scale drug deals); United States v. Nunez, 958 F.2d 196, 198 (7th Cir.)(upholding 2-year lapse where buyer incarcerated in the interim); United States v. Cedano-Rojas, 999 F.3d 1175, 1180 (7th Cir. 1993) (affirming relevant conduct determination where temporal delay attributable to unavailability of supplier).

459. The "reasonable foreseeability" test does NOT apply to actions for which a defendant is directly responsible. USSG 1B1.3(a)(1)(A), Note 2.

Relevant conduct in drug cases does NOT include any amounts possessed for personal use. United States v. Kipp, 10 F.3d 1463, 1465-66 (9th Cir. 1993). Defendant bears the burden of establishing the quantity possessed for personal use by a preponderance of the evidence.

Relevant Conduct DOES include:

1. Conduct underlying dismissed counts. USSG 1B1.2(a)(2); United States v. Fine, 975 F.2d 596 , 599-600 (9th Cir. 1992) (en banc); see also USSG §6B1.2(a).

2. Acts falling beyond the applicable statute of limitations for an offense. See e.g. United States v. Williams, 217 F.3d 751 (9th Cir.) (affirming sentencing court's reliance upon pre-limitations period conduct to justify an enhancement to a base offense level), cert. denied, 531 U.S. 1001 (2000).

3. Suppressed evidence otherwise inadmissible at trial. United States v. Kim, 25 F.3d 1426, 1435-36 (9th Cir. 1994).

4. Conduct underlying an acquitted charge, so long as the conduct is established by a preponderance of the evidence. United States v. Watts, 519 U.S. 148 (1997).[4]

5. Conduct underlying a vacated conviction. United States v. Franklin, 235 F.3d 1165 (9th Cir. 2000).

6. Hearsay evidence, so long as it has a "sufficient indicia of reliability to support its probable accuracy." United States v. Egge, 223 F.3d 1128, 1132 (9th Cir. 2000). The Ninth Circuit has held that "this requirement demands extrinsic corroborating evidence that supports the hearsay statement." Id. See e.g. United States v. Valensia, 222 F.3d 1173, 1183 (9th Cir. 2000) (co-conspirator hearsay sufficient where three different conspirators provided same story independently and telephone records partially corroborated their description of defendant's central role in conspiracy), vacated, 532 U.S. 901 (2001).[5]

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[4] The Watts decision overrules earlier, contrary 9th Circuit authority. See United States v. Brady, 928 F.2d 844, 850-52 (9th Cir. 1991).

[5] The Ninth Circuit has held that hearsay may have to be excluded from a supervised release revocation hearing. United States v. Comito, 177 F.3d 1166 (9th Cir. 1999). Prior to admitting any hearsay, the court must engage in a balancing test and weigh the defendant's confrontation rights against the Government's "good cause for denial." Id. In considering this

B. Standard of Proof: as applied to Relevant Conduct and/or Sentencing Enhancements

(1) The general rule is that the party seeking the enhancement and/or reduction must establish a factual predicate by a preponderance of the evidence;[6] (2) for sentencing enhancements that are challenged and that have a "disproportionate" effect on sentencing, the government must prove the factual predicate by clear and convincing evidence; and (3) if the factual predicate for the sentencing enhancement is NOT challenged, the government need only meet a preponderance standard of proof. United States v. Charlesworth, 217 F.3d 1155, 1157-59 (9th Cir. 2000). Other than an enhancement based upon a prior conviction, any sentencing decision that results in an increase in the statutory maximum penalty must be established beyond a reasonable doubt. See United States v. Velasco-Heredia, 319 F.3d 1080 (9th Cir. 2003) (drug quantity that raises statutory minimum and maximum must be established beyond a reasonable doubt).

As the law in the Ninth Circuit currently stands, a preponderance of the evidence standard generally applies to sentencing enhancements of up to at least 4 levels and a 2 year penalty increase. See United States v. Hopper, 177 F.3d 824, 833 (9th Cir. 1999); see also United States v. Herrera-Rojas, 243 F.3d 1139, 1143 (9th Cir. 2001) (preponderance standard applies to 3-level, 13 month increase). The clear and convincing standard applies to sentencing enhancements of at least +7 levels with a 48 month increase. See Id; see also United States v. Bonilla-Montenegro, 331 F.3d 1047 (9th Cir. 2003) (clear and convincing standard applies to 16-level increase under immigration conviction, § 2L1.2)[7]; United States v. Mezas de Jesus, 217 F.3d 638, 642-44 (9th Cir.

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balance, the court should focus upon two factors: (1) the importance of the hearsay evidence to the court's ultimate conclusion; and (2) the nature of the facts to be proven by the hearsay. Id.

In Comito, the court reversed a district court's revocation decision, where the violation was premised solely upon a hearsay statement (proffered through a probation officer) of the defendant's girlfriend regarding the defendant's alleged use of the girlfriend's credit cards without her consent.

[6] One notable exception to this rule is under 2D1.8(a)(2) which provides a 4-level reduction if a defendant, convicted of maintaining a drug establishment, did not participate in the underlying offense. In United States v. Leasure, 319 F.3d 1092 (9th Cir. 2003), the court held that the burden of establishing the lack of entitlement to this reduction falls to the government. But see United States v. Culps, 300 F.3d 1069, 1082 (9th Cir. 2002) (noting burden of establishing non-participation was on the defendant).

[7] However, in the absence of any challenge to the authenticity of documents of a prior aggravated felony, the government need not produce certified records of the prior conviction to meet this standard. United States v. Chavaria-Angel, 323 F.3d 1172 (9th Cir. 2003).

2000) (9 level/48 month increase requires proof by clear and convincing evidence).[8] This leaves only enhancements of 5-6 in the "grey" zone.

"Relevant Conduct" for purposes of a drug quantity determination need only be established by a preponderance of the evidence, regardless of the degree of the dispute. In United States v. Rosacker, 314 F.3d 422 (9th Cir. 2002), the court held that the "extremely disproportionate" sentencing enhancement standard does not apply to drug quantity approximations. The court reasoned that the higher evidentiary standard is only triggered when the court is confronted with a sentencing enhancement premised upon uncharged conduct. Id. See also United States v. Harrison-Philpot, 978 F.2d 1520 (9th Cir. 1992) (no higher standard applicable to drug conspiracy quantity determination).[9] However, under United States v. Restrepo, 946 F.2d 654, 659 (9th Cir. 1992), the higher evidentiary standard may be triggered for drug quantity determinations if the increase is premised upon a separate, uncharged transaction. The Ninth Circuit extended the holding in Harrison-Philpot, to a fraudulent check cashing conspiracy in United States v. Riley, 335 F.3d 919 (9th Cir. 2003), rejecting a defendant's claim that a higher evidentiary standard should apply to disputed factors relative to the extent of the conspiracy. The court held that enhancements premised upon losses intended by the conspiracy were on a "'fundamentally different plane' than those enhancements based on conduct for which the defendant was not convicted." Id. But see United States v. Peyton, 2003 WL 23095714, No. 02-50482 (9th Cir. Dec. 32, 2003) (applying disproportionality test to relevant conduct determination).

In determining whether the higher evidentiary standard applies, all of the challenged enhancements must be considered together in the aggregate. United States v. Jordan, 256 F.3d 922 (9th Cir. 2001). Thus, if a defendant challenges a 4 and 5 level enhancement, the court must determine whether the combined 9-level enhancements have a disproportionate impact on sentencing so as to justify use of the more stringent evidentiary standard. Id.

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[8] The Seventh Circuit has rejected the clear and convincing evidence standard as applied to a sentencing guideline enhancement determination that doubled a base offense level. United States v. Ofcky, 237 F.3d 904 (7th Cir. 2001). The court acknowledged that a higher standard "might" apply in an "extreme" case, but found that such an extreme case had yet to appear, noting that it had rejected similar challenges where the offense level increased from 51-63 months to Life and 33-41 months to 40 years imprisonment. Id. (citations omitted).

[9] The Harrison-Philpot court also reasoned that drug quantity was strictly a sentencing issue; a position that has been undermined by the Supreme Court's recent Apprendi decision. However, the analysis relative to conspiracy drug quantity computations under the guidelines still holds.

The court has been careful, however, not to limit its holdings to strict numerical terms--the increase must be "disproportionate" to the underlying base sentence such that a 4 year increase for someone facing a 1 year sentence would trigger the higher standard of proof while a 4 year increase for a defendant facing a 30 year sentence might not trigger the higher standard. The Ninth Circuit has adopted the somewhat loose concept of "the tail which wags the dog;" i.e. if the enhancement becomes of equal or greater significance than the underlying base sentence, then the higher standard should apply. See Mezas de Jesus, 217 F.3d at 1159. The court has not yet addressed whether other considerations could also come into play; for instance, the gun enhancement might trigger higher classification status with the Bureau of Prisons and may render a defendant ineligible or less likely to be enrolled in programs such as the ICC Boot Camp. Further, a gun enhancement under USSG 2D1.1 or a 2-4 level enhancement for role in the offense that then renders a defendant ineligible for safety valve consideration might also fall within the ambit of a "disproportionate" sentencing issue triggering a higher evidentiary standard.

In determining whether a guideline enhancement should trigger the higher "clear and convincing" standard, the Ninth Circuit has held that a district court must consider the totality of the circumstances. Valensia, 222 F.3d at 1182.[10] Factors the Valensia court directed that a sentencing judge should consider include:

> (1) Does the enhanced sentence fall within the statutory maximum? [this would be a rarity and would probably moot itself since a statutory cap trumps any guideline determination, USSG 5G1.1(a)(1).]
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> (2) Does the enhanced sentence "negate the presumption of innocence or the prosecution's burden of proof for the crime alleged in the indictment?" [The panel cites Restrepo and appears to be targeting, for example, a case where a defendant pleads to a single count of distribution which would lead to, e.g. an offense level 10, but based upon other uncharged acts of distribution, relevant conduct leads to an offense level of, e.g. 32. If that's the case, apply the clear and convincing standard. Such a disparity is unlikely today given application of Apprendi principles to pleas and/or jury determinations.]
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> (3) "Do the facts offered in support of the enhancement create new offenses requiring separate punishment?" [if yes, apply the clear and convincing standard.]
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> (4) Is the increase based upon a scope of conspiracy determination? [i.e. if yes, then the preponderance standard applies under United States v. Harrison-Philpot,

[10] Despite the Supreme Court's action on the Valensia case, the Ninth Circuit continues to adhere to its holding relative to the sentencing standard of proof. See Jordan, 256 F.3d 922.

978 F.2d 1520 (9th Cir. 1992) (1993).]

(5) Is the increase less than or equal to 4 offense levels? [i.e., if yes, then apply the preponderance standard under Hopper.]

(6) Is the length of the enhanced sentence more than double the length of the underlying base offense level? [if yes, apply the clear and convincing standard.]

There is very little guidance defining "clear and convincing" evidence and there are no model instructions on this standard. In a partial concurrence/dissent in United States v. Motamedi, 767 F.2d 1403, 1413 (9th Cir. 1985), Judge Boochever identified three standards of proof: (1) preponderance, (2) clear and convincing, and (3) beyond a reasonable doubt. He explained that "clear and convincing" is an "intermediate standard" requiring more proof than a preponderance and less than a reasonable doubt. See also United States v. Kaluna, 192 F.3d 1188, 1204 (9th Cir. 1998) (en banc), cert. denied, 120 S. Ct. 1561 (2000) (Thomas, J. dissenting), quoting State v. Johnson, 131 Or. App. 561 (1996) (clear and convincing evidence means evidence of "extraordinary persuasiveness"); Waits v. Frito-Lay, Inc., 978 F.2d 1093, 1105 (9th Cir. 1992), (clear and convincing standard under California law requires "evidence sufficient to support finding of high probability.").

II. USSG Chapter 2

A. Embezzlement/Theft/Fraud: 2B1.1

(1) The district court need only make a "reasonable estimate of the loss given available information." 2B1.1, App. 3. The court should use the amount of loss the defendant intended to inflict, if such a figure can be determined with reasonable certainty and if it is greater than actual losses suffered. United States v. Munoz, 233 F.3d 1117, 1126 (9th Cir. 2000). The amount of loss the defendant intended to inflict need not be “realistically possible.” United States v. Robinson, 94 F.3d 1325, 1328 (9th Cir. 1996).

Any finding must be supported by a preponderance of the evidence, United States v. Collins, 109 F.3d 1413, 1420 (9th Cir. 1997), unless the disputed loss amount involves a base offense level increase that results in a "disproportionate" impact upon the sentence. See United States v. Munoz, 233 F.3d 1117 (9th Cir. 2000) (applying clear and convincing standard to 9-level increase for fraud loss under former 2F1.1).

(2) In determining an offense level for embezzlement, the court should consider acts occurring beyond the 5-year statute of limitations in calculating the amount of loss if consistent with relevant conduct principles and so long as the sentence

imposed falls within the maximum sentence specified for the offense of conviction. United States v. Williams, 217 F.3d 751, 754 (9th Cir.), cert. denied, 531 U.S. 1001 (2000).

(3) The loss calculation should not be offset by the value of recovered property. United States v. Choi, 101 F.3d 92, 93 (9th Cir. 1996). Losses may be reduced for any amounts the defendant repays to the victim **prior** to discovery of the offense; there is no reduction for amounts repaid following discovery of the offense, but before indictment. United States v. Stoddard, 150 F.3d 1140, 1146 (9th Cir.1998).
However, victim refunds (even if paid prior to official discovery of the offense) need not be deducted where they permitted the defendant to continue the fraudulent scheme. See United States v. Bright, No. 02-50492 (9th Cir. Jan. 9, 2004); United States v. Ciccone, 219 F.3d 1078, 1086 (9th Cir. 2000); United States v. Sayakhom, 186 F.3d 928 (9th Cir. 1999); United States v. Blitz, 151 F.3d 1002 (9th Cir. 1998).

(4) Fraudulent Loan Cases: Where a defendant makes a false statement on a loan application and has no intention of repaying any portion of the loan, the district court may use the entire loan figure as the loss amount, even if the lender recoups a portion of its losses. United States v. McCormac, 309 F.3d 623, 627 (9th Cir. 2002). However, if the court is going to rely upon an intended loss figure, instead of actual losses, it must make a specific inquiry into the defendant's intent and consider whether collateral was pledged and whether the defendant had any ability to repay the loan. See United States v. Shaw, 3 F.3d 311 (9th Cir. 1993) (reversing district court's use of entire loan figure where defendant operated a legitimate business with several partners and facts supported defense assertion that intended loss was something less than full loan value); United States v. Salemo, 81 F.3d 1453 (9th Cir. 1996)(entire loan figure appropriate where defendant was a prisoner at a half-way house posing as a legitimate businessman; defendant was penniless, had no assets and no reasonable expectation of any repayment).

(4) A district court may base the loss amount on the defendant's asking price where the items involved (e.g. Native American cultural items) did not have a broad, active market. United States v. Tidwell, 191 F.3d 976, 981 (9th Cir. 1999).

(5) An enhancement under 2B1.1(b)(4)(B) for being in the business of receiving and selling stolen property must be examined under the totality of the circumstances. United States v. Zuniga, 66 F.3d 225, 228 (9th Cir. 1995). Under this test, "the sentencing judge undertakes a case-by-case approach with emphasis on the regularity and sophistication of a defendant's operation." Id.

*Note: Restitution is limited to actual losses and cannot include consequential

damages. Stoddard, 150 F.3d at 1146.

(6) A 2-level enhancement pursuant to 2B3.1(b)(2)(F) for a "threat of death" may be premised solely upon a defendant's assertion that he "has a gun," since the implication is clear that he may use it. United States v. Jennette, 295 F.3d 290 (2d Cir.) (additional cases cited therein; Second Circuit joins 3rd, 7th, 1st and 4th Circuits), cert. denied, 123 S. Ct. 667 (2002). Although the Ninth Circuit has yet to issue a published decision directly on point, the court has held that the statement "I have a gun" is sufficient to justify the enhancement. United States v. Barrientos, 13 Fed. Appx. 551, 2001 WL 711568 (9th Cir.), cert. denied, 534 U.S. 1014 (2001).

B. Drug Quantity Estimates: 2D1.1

The court must err on the side of caution in estimating drug quantities. United States v. Scheele, 231 F.3d 492, 498 (9th Cir. 2000). In drug cases involving labs and estimations of lab capacities, the court must give the defendant the benefit of any "margin of error." See United States v. Culps, 300 F.3d 1069, 1076 (9th Cir. 2002); Scheele, 231 F.3d 492; and United States v. Garcia-Sanchez, 238 F.3d 1200 (9th Cir. 2001) (affirming district court drug quantity determination where court gave defendant every benefit of every doubt and reduced arithmetical numbers in favor of defendant by 20% in order to account for any possible defects in witness memories).

In determining a base offense level, the court may use the purity of drugs actually seized to estimate the purity of the total quantity of drugs defendant agreed to deliver. United States v. Lopes-Montes, 165 F.3d 730, 731 (9th Cir. 1999).

In estimating a methamphetamine lab capacity, the court may use flask capacity times a minimum estimated number of reactions. United States v. August, 86 F.3d 151, 154-55 (9th Cir. 1996). Any assumptions used in assessing lab capacity must be based upon a "reliable evidentiary basis." United States v. Rosacker, 314 F.3d 422 (9th Cir. 2002).

If the court determines that the amount of drugs actually seized does not reflect the scale of the offense, it may approximate drug quantity so long as three criteria are met: (1) there must be proof that the defendant is "more likely than not actually responsible for a quantity greater than or equal to the quantity for which [he] is being held responsible;" (2) any information used to support the approximation "must possess sufficient indicia of reliability to support its probable accuracy;" and (3) once a figure is reached, the court must "err on the side of caution" and round down to the nearest offense level. United States v. Culps, 300 F.3d 1069, 1076 (9th Cir. 2002). The Ninth Circuit has expressly approved of the "multiplier" method to approximate drug quantity, but it has required proof of a "continuous" operation. Id. at 1080. Further, the government may not rely solely upon quantities negotiated by government agents as evidence of an "average" transaction. Id. at 1078-79.

A defendant bears the burden of producing some evidence that a portion of drugs seized were for his own personal use; however, the burden of persuasion for establishing drug quantity always remains with the government. United States v. Gonzales, 307 F.3d 906, 914 (9th Cir. 2002). Where a defendant produces some evidence that some of the drugs he possessed were for personal use, the district court must make an explicit analysis of the quantity of drugs intended for distribution. Id.

C. Firearms - Possession in Connection with Drug Activity: 2D1.1(b)(1)

Pursuant to USSG § 2D1.1, if the government proves that weapons were present in relation to drug activity, the burden shifts to the defendant to establish that it is "clearly improbable" that the weapons were connected to the drug offense. "Possession," for purposes of this subsection, has been broadly defined. United States v. Willard, 919 F.2d 606 (9th Cir. 1990). For purposes of applying the enhancement, the court should look to all acts within relevant conduct underlying the conviction. Id. at 610.

A defendant need only have possessed the weapon during the commission of the offense; the government need not show a direct connection between the weapon and drug trafficking activity. See Willard.; see also United States v. Heldberg, 907 F.2d 91 (9th Cir. 1990) (affirming enhancement based upon unloaded firearm kept in locked vehicle trunk used for drug deliveries). Further, close or immediate proximity between the weapon and drugs is not required. See e.g. United States v. Pitts, 6 F.3d 1366, 1371 (9th Cir. 1993) (affirming enhancement where loaded firearm found in bedroom and meth lab located just outside residence). Possessing firearms and drugs in the same residence is generally sufficient to support the enhancement. United States v. Gillock, 886 F.2d 220, 222 (9th Cir. 1989); see also, United States v. Kyllo, 37 F.3d 526, 531 (9th Cir. 1994);[11] United States v. Alexander, 292 F.3d 1226 (10th Cir. 2002) (government need only establish a "spatial" and "temporal" relationship between gun and drugs; gun in box with defendant's fingerprint stored next to drugs in a co-defendant's closet justified enhancement); Contrast United States v. Cooper, 274 F.3d 230, 245-46 (5th Cir. 2001) (reversing enhancement where defendant found with gun at time of arrest in his car, but no drug paraphernalia seized from the car and no evidence defendant ever used the car to deliver drugs or otherwise used the firearm in relation to drug trafficking).

A defendant's sentence should also be enhanced under this sub-provision if a co-conspirator possessed a firearm and such possession was reasonably foreseeable to the defendant. United States v. Garcia, 909 F.2d 1346, 1349 (9th Cir. 1990).

Under United States v. Nelson, 222 F.3d 545 (9th Cir. 2000), application of this enhancement does not necessarily preclude relief under the safety valve, 5C1.1. The

[11] The Kyllo decision was reversed on other grounds with the Supreme Court holding that the use of a thermal imaging device violates the 4th Amendment. See 533 U.S. 27 (2001).

court must engage in two distinct inquiries; under 5C1.1, the defendant need only establish by a preponderance of the evidence (rather than a clear improbability) that the gun was unconnected to the drug offense. Ordinarily, a two level increase under 2D1.1 will effectively mean that the safety valve is inapplicable. See United States v. Smith, 175 F.3d 1147 (9th Cir. 1999). However, the "reasonable forseeability" test applicable to 2D1.1 has been held to be inapplicable to the possession inquiry under 5C1.2. Although the Ninth Circuit has yet to directly address this issue, every Circuit to date has held that to be ineligible for safety valve treatment, the defendant must have actually possessed the weapon himself. See United States v. Harris, 230 F.3d 1054 (7th Cir. 2000), cert. denied, 532 U.S. 988 (2001) (citations therein); see also United States v. Pena-Sarabia, 297 F.3d 983 (10th Cir. 2002) (overruling prior 10th Circuit precedent and holding that a husband's possession of a firearm should not be used to deny wife's eligibility for safety valve treatment even if husband's possession was reasonably forseeable).

A defendant convicted of a drug offense and a firearms offense under §924(c) is ineligible for a 2-level gun enhancement, even if the drug offense involved possession or constructive possession of more than one firearm. United States v. Aquino, 242 F.3d 859, 864-65 (9th Cir. 2001).[12]

D. Firearms - Stolen, Altered or Obliterated Serial Numbers

Guideline 2K2.1(b)(4) provides a 2-level increase if a firearm used in the offense of conviction was "stolen, or had an altered or obliterated serial number." This enhancement does NOT apply to a homemade silencer that "never had a serial number that could be altered or obliterated." United States v. Seesing, 234 F.3d 456 (9th Cir. 2001) (amended opinion). The court explained that this was a loophole left by the guidelines and that it would be up to the Sentencing Commission to correct the oversight.

A defendant need not have actual knowledge that the gun was stolen or unlawfully modified for the enhancement to apply. USSG 2K2.1, App. Note 19; see also United States v. Goodell, 990 F.2d 497 (9th Cir. 1993) (holding strict liability language within 2K2.1(b)(4) provision does not violate due process).[13]

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[12] This holding is premised upon the November, 2000 Amendment to USSG § 2K2.4 and expressly overrules the court's prior decision in United States v. Willett, 90 F.3d 404 (9th Cir. 1996).

[13] Any doubts regarding the viability of Goodell in light of the Supreme Court's decision in Staples v. United States, 511 U.S. 600, 605 (1994) (holding mens rea required for conviction under 26 U.S.C. 5861), were laid to rest with United States v. Gonzales, 262 F.2d 867 (9th Cir. 2001). In Gonzales, the defendant challenged a 2-level enhancement for use of a minor in a counterfeiting scheme. On appeal, she argued that the enhancement was improper absent evidence she knew of the minor's age. The court expressly rejected the defendant's attempted reliance upon Staples since the Supreme Court's decision focuses on conviction rather than a sentencing issue. Id. at 870. The court further rejected any general attempt to impute a scienter

E. Firearms - Use in Connection with Another Felony

Under 2K2.1(b)(5), a defendant's base offense level is increased by four levels if he "used or possessed any firearm or ammunition in connection with another felony offense." The government bears the burden of proving facts to justify this enhancement by a preponderance of the evidence. See United States v. Polanco, 93 F.3d 555, 556 (9th Cir. 1996).

A "felony offense" under 2K2.1(b)(5) is "any offense (federal state or local) punishable by imprisonment for a term exceeding one year, whether or not a criminal charge was brought, or conviction obtained." USSG § 2K2.1 comment n.7. The Ninth Circuit has developed a two-pronged approach for applying section 2K2.1(b)(5): (1) the government must establish that the firearm was "used" in connection with another felony; and (2) the government must establish that the weapon was actually or constructively in the defendant's possession and that the manner of its possession, "permits an inference that it facilitated or potentially facilitated a defendant's felonious conduct." Id. at 566-67 (quoting United States v. Routon, 25 F.3d 815, 819 (9th Cir. 1994).

Cases that have found a rational connection between drugs and the possession of guns acknowledge that ready access to a firearm allows a drug dealer to protect his cache and to threaten others for payment for or procurement of drugs; further a firearm can be used as a medium of exchange for drugs. See e.g. Smith v. United States, 508 U.S. 223, 240-41 (1993) (holding that gun-for-drugs trade is a "use" relating to drug trafficking under 924(c)); Polanco, 93 F.3d at 567 (noting that a firearm afforded defendant a "ready means of compelling payment or of defending the cash and drugs"); accord United States v. Condren, 18 F.3d 1190, 1198-1200 (5th Cir. 1994) (noting that "theft is a close and ever present partner of illegal drugs," and an accessible firearm helps the defendant "protect his drug-related activities").[14]

Generally, there will be two factual disputes that a district court must resolve relative to the 4-level enhancement under 2K2.1(b)(5):

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requirement upon guideline enhancement provisions where such a reading would be contrary to the plain language of the guideline. Id.

[14] See also United States v. Loney, 219 F.3d 281 (3rd Cir. 2000) (upholding increase for defendant who carried a firearm during a drug transaction; despite defendant's claim he carried the gun for personal protection, court noted that defendant had increased need for protection due to drug trafficking activity); United States v. Peterson, 233 F.3d 101, 111 (1st Cir. 2000) (enhancement upheld where evidence established defendant stored guns with drugs as part of his modus operandi).

(1) Did the defendant commit another felony offense? If so,
(2) Was his possession of firearms in connection with that felony offense?

What constitutes "another" felony offense was recently addressed in United States v. Fenton, 309 F.3d 825, 827-28 (3rd Cir. 2002). Fenton was convicted of being a felon in possession of firearms; he came into possession of the guns when he stole them from a sporting good store. The Third Circuit rejected the enhancement, holding that the phrase "'another felony offense' cannot apply to the same felonious conduct for which the criminal defendant is being sentenced." The court noted the existence of an even split of authority on this issue; the Court joined the 6th and 7th Circuits and declined to follow decisions from the 5th and 8th Circuits. Id.

III. USSG Chapter 3

A. Role Enhancements

(1) Upward Adjustments:

(A) 3B1.1 - Organizer, Leader or Supervisor

An aggravating role adjustment is only appropriate if the court finds that the defendant occupied a specified role, such as that of an organizer, leader or supervisor. The fact that a defendant may be more culpable than other co-participants is insufficient, standing alone, to justify a role enhancement. United States v. Morgan, 238 F.3d 1180, 1186 (9th Cir. 2001). However, the fact that a defendant's supervision may have been limited in scope or duration is insufficient to counteract the enhancement: "a single incident of persons acting under a defendant's direction is sufficient evidence to support a two-level role enhancement." Id.

Factors to be considered in determining if a defendant is an organizer or a leader include: (1) decision-making authority; (2) the nature of the offense and the nature of the defendant's participation; (3) whether the defendant recruited accomplices; (4) whether the defendant claimed a right to a greater share of the profits of the crime; and (5) the degree of control and authority exercised over others. United States v. Ponce, 51 F.3d 820, 826 (9th Cir. 1995), citing USSG 3B1.1, comment. (n.4).

1) Drug customers who are solely "end users" are NOT participants for purposes of a managerial role enhancement under 3B1.1. United States v. Egge, 223 F.3d 1128 (9th Cir. 2000).

2) Evidence that other conspirators "looked to" the defendant for "approval of

their action[s]" supported a 2-level leader enhancement. United States v. Panaro, 266 F.3d 939, 952 (2001). However, another participant's "deferential behavior" towards the defendant may be insufficient. See United States v. Jordan, 291 F.3d 1091, 1098 (9th Cir. 2002). Further, merely having "leadership qualities" or a "strong personality" is insufficient to merit the increase. Id.

3) A defendant who produced counterfeit money orders for use by his co-conspirators, who then shared in the profits was sufficient to sustain a 3-level upward adjustment for an aggravating role in the offense. United States v. Riley, 335 F.3d 919 (9th Cir. 2003).

(B) 3B1.3 - Abuse of Trust

A 2-level increase for abuse of trust is appropriate where a defendant uses his or her position of public or private trust to facilitate the commission of or concealment of the offense. 3B1.3, cmt n.1. Critical to the inquiry is "the extent to which the position provides the freedom to commit a difficult to detect wrong." United States v. Brickey, 289 F.3d 1144, 1154 (9th Cir. 2002).

The position of trust is established by reference to the victim of the crime. Id. at 1154. In tax crimes, the United States government is the victim. Id. A federal employee who abuses his position with another government agency to evade taxes due the IRS qualifies for this enhancement. Id.

(2) Downward Adjustments, 3B1.2

Defendant bears the burden of establishing a factual basis for such an adjustment by a preponderance of the evidence. United States v. Davis, 36 F.3d 1424, 1436 (9th Cir. 1994). Application Notes accompanying USSG § 3B1.2(a) caution that the reduction for "minimal" role should be used "infrequently" and that it is appropriate only where a defendant is "among the least culpable" of those involved in group criminal activity. Defendant must prove that he is "substantially less culpable" than other participants. United States v. Benitez, 34 F.3d 1489, 1497 (9th Cir. 1994). A downward adjustment for a minor (-2) or minimal (-4) role in an offense is appropriate only where a defendant's role is minor or minimal compared to other participants in the same offense or relevant conduct. United States v. Kipp, 10 F.3d 1463, 1468 (9th Cir. 1993). However, merely being less culpable than one's co-participants is insufficient. United States v. Andrus, 925 F.2d 335, 338 (9th Cir. 1991); see also United States v. Ocampo, 937 F.2d 485, 491 (9th Cir. 1991) (affirming rejection of a role reduction where defendant admitted he was well paid for his services and he flew across the country to participate in a drug delivery).

In making this assessment, the court must view the defendant's role in the offense relative to all participants in the scheme and not limit the inquiry to named defendants. United States v. Rojas-Millan, 234 F.3d 464 (9th Cir. 2000), cert. denied, 123 S. Ct. 271 (2002). Thus, as to uncharged others, if the court finds "sufficient evidence of their existence and participation in the overall scheme, [the court] should consider that evidence when evaluating [the defendant's] relative culpability and deciding whether to grant a minor role adjustment." Id.

In addition, the court should consider defendant's role in the offense of conviction relative to the defendant's actual criminal conduct; thus, if the charge of conviction has already taken the defendant's role into consideration (e.g. defendant has not been held accountable for the full range of relevant conduct possible under a conspiracy charge), then a role reduction is generally inappropriate. USSG 3B1.2, Application Note 4.

The court need not make detailed factual findings relative to a role adjustment. "A simple statement by the district court that the defendant was not a minor participant is typically sufficient to settle the question." Ocampo, 937 F.2d at 491.

B. Obstruction, 3C1.1

(1) Perjury: An obstruction enhancement based upon perjury requires proof that the defendant willfully testified falsely as to a material matter. United States v. Shannon, 137 F.3d 1112, 1119 (9th Cir. 1998) (per curiam). Where a defendant objects to the enhancement, the district court must determine if "the defendant's perjured testimony was intentional and not resulting from confusion, mistake or faulty memory." United States v. Mattarolo, 209 F.3d 1153, 1159 (9th Cir.) (citing United States v. Dunnigan, 507 U.S. 87, 94 (1993)), cert. denied, 531 U.S. 888 (2000). In making this determination, the court must address "each element of the alleged perjury in a separate and clear finding." United States v. Monzon-Valenzuela, 186 F.3d 1181, 1183 (9th Cir. 1999). See also United States v. Jimenez, 300 F.3d 1166, 1171 (9th Cir. 2002) (reversing district court for failure to make specific findings of materiality).

The Ninth Circuit has explicitly rejected a per se approach wherein any defendant who chooses to testify in his own defense is automatically subject to an obstruction enhancement by virtue of a guilty verdict: "It is not enough that the defendant chose to testify and was convicted. Imposing the enhancement without a judicial finding of perjury might unduly burden the defendant's constitutional right to testify." Id.

(2) Post-Arrest Flight[15]: An obstruction enhancement may apply when a defendant absconds following his arrest, so long as there is sufficient evidence to support a finding that he specifically intended to obstruct justice. United States v. Brown, 321 F.3d 347 (2d Cir. 2003). The escape need not be successful. See e.g. United States v. Wills, 88 F.3d 704, 721 (9th Cir. 1996) (enhancement applied for unexecuted conspiracy to escape). An extremely broad standard applies to the "custody" element. See e.g. United States v. Mondello, 927 F.2d 1463, 1466 (9th Cir. 1991) (enhancement applied for defendant's 3 weeks of evasive conduct); United States v. Billingsley, 160 F.3d 502, 506 (8th Cir. 1998) (enhancement upheld where defendant absconded while out of custody solely to effectuate cooperation agreement). Duration is not an element. See United States v. Takahashi, 205 F.3d 1161 (9th Cir. 2000) (applying enhancement to defendant who escaped and turned himself in a few hours later); Cf. United States v. Draper, 996 F.2d 982 (9th Cir. 1993) (applying enhancement to escape from community corrections center where defendant was ordered to reside as a condition of supervised release).

(3) Other: Submitting a false financial affidavit to a magistrate judge for purposes of obtaining appointed counsel merits the 2-level increase. United States v. Hernandez-Ramirez, 254 F.3d 841 (9th Cir. 2001).

C. Acceptance of Responsibility, 3E1.1

(1) Denial Based Upon New Criminal Conduct

(a) The new criminal conduct need not fall within the definition of relevant conduct, nor does it need to be similar to or related to the underlying offense for the court to deny an acceptance reduction. United States v. Ceccarini, 98 F.3d 126 (3rd Cir. 1996); United States v. Byrd, 76 F.3d 194, 196 (8th Cir. 1996) (additional citations therein).

(b) The new criminal behavior need not be similar to the crime charged, but it helps. The Ninth Circuit has held that a guilty plea constitutes significant evidence of acceptance of responsibility that may only be overcome by some other, "significant" evidence. United States v. Vance, 62 F.3d 1152 (9th Cir. 1995). However, neither similarity nor gravity are required to justify denial of acceptance. In United States v. Ngo, 132 F.3d 1231, 1233 (8th Cir. 1997), a defendant convicted of a counterfeit check scheme was denied an acceptance of responsibility reduction based upon a post-plea driving offense. However, the district court also made specific findings that the defendant had made false statements relative to an attempt to minimize his role in the offense of conviction.

(c) The new criminal conduct must post-date the plea or some statement of

[15] Section 3C1.1 does not apply to pre-arrest flight. See Application Note 5(d).

contrition and/or acceptance either to investigating authorities and/or probation. See e.g. United States v. Schroeder, 2000 WL 1459730 (TABLE, 9th Cir. 9/28/00); United States v. Cooper, 912 F.2d 344, 348 (9th Cir. 1990).[16]

(2) Denial based upon "minimizing"

A defendant who presents no defense but who attempts to minimize his own conduct is not entitled to a reduction for acceptance. See e.g. United States v. Scrivener, 189 F.3d 825 (9th Cir. 1999) (denying acceptance where defendant falsely portrayed himself as a passive participant in a fraudulent scheme); United States v. Dozier, 162 F.3d 120, 127 (D.C. Cir. 1998) (affirming denial of acceptance where defendant admitted that he possessed the gun, but falsely claimed he had bought it years prior and had forgotten that he still had it); United States v. Gunning, 339 F.3d 948 (9th Cir. 2003)) (affirming denial of acceptance reduction where defendant 'blamed others' for his fraudulent activity).

A defendant who denies an essential element of the offense (such as intent) at trial and at sentencing is also not entitled to a reduction for acceptance of responsibility. United States v. Fleming, 215 F.3d 930 (9th Cir. 2000). A defendant who denies a factual element relevant to guilt at trial, but later admits his guilt at sentencing may still qualify for a 2-level reduction; the court must expressly consider all of the factors set forth in USSG 3E1.1 and exercise discretion. United States v. Cortes, 299 F.3d 1030 (9th Cir. 2002), cert. denied, 123 S. Ct. 1333 (2003).

(3) Denial of an Acceptance Reduction may NOT be based upon the following:

(a) A categorical or per se approach; see e.g. United States v. Davis, 36 F.3d 1424, 1435 (9th Cir. 1994) (reversing a district court where denial based solely upon the fact that defendant raised an entrapment defense);

(b) Factors that are irrelevant to the acceptance issue; see e.g. United States v. Chastain, 84 F.3d 321-323-24 (9th Cir. 1996) (error to allow acceptance based upon negative publicity, legal fees expended and professional liability);

(c) Failure to interview with probation. United States v. Vance, 62 F.3d 1152, 1157 (9th Cir. 1995).

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[16] At least one court has held that "other criminal conduct" must take place after a guilty plea or it cannot be considered in assessing a defendant's acceptance of responsibility. United States v. Tilford, 224 F.2d 865 (6th Cir. 2000). In an unpublished opinion, United States v. Davis, 2000 WL 1387624 (9th Cir.) , the Ninth Circuit suggested the same. However, such a holding would be contrary to the Ninth Circuit's Cooper decision wherein the court upheld the denial of acceptance when the defendant committed additional criminal conduct 4 days before entering a guilty plea.

(d) Refusing to cooperate with investigating authorities. Id. at 1158.

(e) A court may not grant a 1-level downward adjustment for partial acceptance of responsibility. United States v. Jeter, 236 F.3d 1032 (9th Cir. 2001).

*Note for Cases Predating the "Protect Act" of 2003: If a defendant qualifies for a 2-level reduction for acceptance under 3E1.1, the district court MUST allow the additional 1-level so long as the defendant's acceptance was "timely" and complete or relieved the government of the burden of trial preparation. See United States v. Ruelas-Arreguin, 219 F.3d 1056, 1062 (9th Cir. 2000) (timely post-arrest admission of all elements of charged crime mandates additional 1-level adjustment under 3E1.1(b) even though defendant proceeded to trial and his admission was not used at trial); United States v. Blanco-Gallegos, 188 F.3d 1072, 1076 (9th Cir. 1999) (fact that defendant recants a confession may undermine acceptance but cannot justify denial of the additional 1-point); United States v. Eyler, 67 F.3d 1386, 1392 (9th Cir. 1995) (court could not deny additional 1-level for acceptance based upon finding that defendant lied about matters beyond the scope of conviction; if defendant qualifies for reduction under 3E1.1(a), then additional 1-level is mandatory if either (b)(1) or (b)(2) conditions are met).

IV. CONCURRENT/CONSECUTIVE SENTENCING

While 5G1.3 provides guidance for application of concurrent or consecutive sentencing, the district court nevertheless retains the discretion to consider the appropriateness of such a determination under 18 U.S.C. § 3584. United States v. Wills, 881 F.2d 823 (9th Cir. 1989). However, if a court exercises its discretion and declines to follow 5G1.3, it must follow the usual departure procedures. United States v. Pedrioli, 931 F.2d 31 (9th Cir. 1991). This includes prior notice to the parties from the court. United States v. Williams, 291 F.3d 1180, 1193 (9th Cir. 2002).[17] In any event, the court must make express factual findings to justify a concurrent or consecutive sentence. United States v. Chea, 231 F.3d 531 (9th Cir. 2000).[18]

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[17] The text of the Williams decision (and the dissent from Judge Graber) suggests that notification in the PSR and to the prosecutor is insufficient; thus, the court itself should notify the parties in advance of sentencing of its intent to decline to follow 5G1.3.

[18] For any defendant who committed an offense prior to 1995, use the guidelines in effect on the date of the offense conduct. The Ninth Circuit has held that the 1995 amendments to 5G1.3 were a substantive change and that application of the 1995 (or later) version to a defendant who committed an offense prior to that date would violate the Ex Post Facto clause. United States v. Chea, 231 F.3d 531 (9th Cir. 2000).

The court's authority to order that a sentence run consecutively to or concurrently with a sentence imposed by another court is limited to instances in which a defendant has already been sentenced by the other court. United States v. Clayton, 927 F.2d 491, 493 (9th Cir. 1991). Thus, if a defendant is pending sentence in another jurisdiction at the time of his federal sentencing, the district judge lacks jurisdiction to order that the federal sentence run concurrent with or consecutive to the state sentence.[19]

If the defendant has been sentenced in a state proceeding prior to the federal sentencing proceeding, and if there is a delay in the federal indictment and/or sentencing, the district court may consider a downward departure because the delay results in a defendant's lost opportunity to seek a concurrent sentence under 5G1.3. United States v. Sanchez-Rodriguez, 161 F.3d 556 (9th Cir. 1998).

V. DEPARTURES

A. Overall Considerations

***Note: The Protect Act of 2003 imposed numerous restrictions on the ability of courts to make downward departures. These new amendments should only apply to cases in which the underlying criminal conduct took place after the Act's effective date of November 1, 2003. See United States v. Johns, 5 F.3d 1267, 1270-71 (9th Cir. 1993) (ex post facto clause bars retroactive application of amendment restricting departures for youthful lack of guidance); United States v. Burrows, 36 F.3d 875 (9th Cir. 1994). Departures in cases involving child crimes and sex offenses are now strictly limited to those expressly identified in USSG Chapter 5K.**

The defendant bears the burden of proving the appropriateness of a downward departure by a preponderance of the evidence. United States v. Lipman, 133 F.3d 726 (9th Cir. 1998); United States v. Anders, 956 F.2d 907, 910 (9th Cir. 1992). If the defendant is subject to a mandatory prison sentence by statute (e.g. 21 U.S.C. § 841(b)(1)(A)), the court may not depart down to a probationary sentence. United States v. Roth, 32 F.3d 437 (9th Cir. 1994).

There are 3 elements the court must factor into any departure consideration:

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[19] There is a 2-3 split among the Circuits on this point and the Ninth Circuit is presently in the minority with the 6th Circuit. See United States v. Quintero, 157 F.3d 1038 (6th Cir. 1998). The 2nd, 5th and 10th Circuits have all held that a federal district judge DOES in fact have the authority to impose a federal sentence and direct that this sentence run consecutively to an anticipated state sentence where there was a determination of guilt in the state proceeding at the time of the federal sentencing. United States v. Williams, 46 F.3d 57 (10th Cir. 1995), United States v. Brown, 920 F.2d 1212, 1217 (5th Cir. 1991), Salley v. United States, 786 F.2d 546, 547 (2d Cir. 1986).

1. Are there facts of an aggravating or mitigating nature or degree not adequately considered by the guidelines; i.e. is this a factually atypical case outside of the "heartland" of cases of a like nature? Particularly where the court considers discouraged and/or prohibited factors, it must specifically address how and why the case is "extraordinary" or "atypical" so as to fall outside of the heartland for similar offenses. United States v. Thompson, 315 F.3d 1071, 1076-77 (9th Cir. 2002).

2. Does the court have the legal authority to depart?

(a) Is the factor raised one expressly forbidden for consideration under the guidelines, e.g. drug or alcohol dependence under USSG 5H1.4?

>> A district court abuses its discretion if it departs based upon a factor expressly forbidden by the guidelines. Impermissible departure considerations include:

(i) the existence of a mandatory consecutive sentence: United States v. Working, 287 F.3d 801, 807 (9th Cir. 2002);
(ii) a low likelihood of recidivism; Id. at 808;
(iii) the viability of a prior state conviction: United States v. Martinez-Martinez, 295 F.3d 1041 (9th Cir. 2002) (extending Custis v. United States, 511 U.S. 486, 490-97 (1994) to departure analysis), cert. denied, 123 S. Ct. 921 (2003);
(iv) disparity between federal and state penalties: United States v. Williams, 282 F.3d 679 (9th Cir. 2002);
(v) substitution of community confinement or treatment may act as an alternative means of incarceration but does not provide a basis for a departure from the length of sentence: United States v. Malley, 307 F.3d 1032 (9th Cir. 2002) (citing 5C1.2, App. Note 6);
(vi) **Protect Act Amendment:** gambling addiction (5H1.4);
(vii) **Protect Act Amendment:** role in the offense (5H1.7; 5K2.0(d)(3));
(viii) **Protect Act Amendment:** acceptance of responsibility (5K2.0(d)(2));
(ix) **Protect Act Amendment:** the fact of a guilty plea (5K2.0(d)(4));
(X) **Protect Act Amendment:** fulfillment of restitution obligations (5K2.0(d)(5)).

(b) Is the factor raised one expressly encouraged for consideration by the guidelines, e.g. adequacy of criminal history category under USSG 4A1.3?

>> A district court must consider the argument and make express findings to justify its conclusion to grant or deny the request.

(c) Is the factor raised one that is discouraged for consideration by the guidelines, e.g. age, 5H1.1?

>> A district court's discretion to depart on one of these grounds must be guided by USSG 5K2.0 and 18 USC 3553(a) and the factor must be unique and/or extreme.

(d) is the factor not addressed by the guidelines at all, e.g. increased sentence severity resulting from deportable alien status?

>> Any factor not addressed by the guidelines must be considered under "the structure and theory of both relevant individual guidelines and the guidelines taken as a whole to decide whether the factor is sufficient to take the case out of the guidelines' heartland." United States v. Charry Cubillos, 91 F.3d 1342 (9th Cir. 1996). This consideration must be tempered by the Commission's "expectation that departures based on grounds not mentioned by the guidelines will be 'highly infrequent.'"

3. The reasonableness of the extent of any departure request.

Koon v. United States, 518 U.S. 81 (1996); United States v. Lira-Barraza, 941 F.2d 745 (9th Cir. 1991).

*** If the court determines that a statutory mandatory minimum applies (e.g. under 841(b)), then the starting point for any departure request (e.g. for substantial assistance to authorities), is the statutory mandatory minimum, NOT the applicable guideline range without reference to the statutory mandatory minimum. United States v. Auld, 321 F.3d 861 (9th Cir. 2003).

Thus, for a 120 month statutory minimum for a defendant with a criminal history category II, the court should look for the guideline that encompasses a 120 month sentence for a category II offender. Giving the defendant the benefit of the doubt yields a 29, II. If the government seeks -4 for assistance, the resulting range would be 25, II and 63-78 months.

*** In determining the appropriate EXTENT of a downward departure based upon substantial assistance, the court may ONLY consider the nature and quality of the defendant's assistance. The government's substantial departure motion does NOT open the door to other departure considerations below a statutory mandatory minimum under 5K2.0. United States v. Valente, 961 F.2d 133 (9th Cir. 1992).

B. Unique Combination of Factors

A unique combination of factors may justify a departure. United States v. Cook, 938 F.2d 149, 152-53 (9th Cir. 1991). **Protect Act Amendment:** The court must find the case exceptional and each individual consideration must be a permissible ground for departure and present to a "substantial degree." USSG 5K2.0(c).

C. State Convictions: Consecutive/Concurrent

A district court may depart due to delay in a federal indictment and/or sentencing that results in the defendant's lost opportunity to seek a concurrent sentence under 5G1.3. See e.g. United States v. Sanchez-Rodriguez, 161 F.3d 556 (9th Cir. 1998) (affirming 10 month departure based upon delay in federal sentencing and defendant's consequent inability to seek sentence that could have run concurrent to state sentence).

D. Aberrant Conduct

The district court must make this assessment viewing the "totality of the circumstances." United States v. Colace, 126 F.3d 1229, 1231 (9th Cir. 1997). However, the defendant's conduct "must truly be a short-lived departure from an otherwise law-abiding life." Id. Aberrant behavior should be assessed "in the context of the defendant's day to day life rather than solely with reference to the particular crime committed." United States v. Working, 224 F.3d 1093, 1100 (9th Cir. 2000).

In United States v. Guerrero, 333 F.3d. 1078 (9th Cir. 2003), the court adopted a two-part procedure that a district court must (expressly) employ in considering any departure request pursuant to this provision: (1) the court must first determine if the case is "extraordinary;" and (2) the court must determine if the conduct constitutes aberrant behavior by examining the factors set forth in Application Note 1. The Ninth Circuit has also held that factors the court should consider include:

(1) the singular nature of the criminal act;

(2) spontaneity and lack of planning;

(3) defendant's criminal record;

(4) any psychological disorders defendant suffers from;

(5) any extreme pressures the defendant may have been facing, such as a job loss;

(6) whether friends and/or family express shock at the defendant's actions; and

(7) defendant's motivation in committing the crime.

Colace, 126 F.3d at 1231, n.2 (citing United States v. Fairless, 975 F.2d 664, 668 (9th Cir. 1992).

No single factor is dispositive. Working, 224 F.3d at 1100. For example, the fact that a robbery involved some planning would not preclude a departure for aberrant behavior. Id. However, significant evidence undermining a single factor may well render relief

under this theory inappropriate. For example, in Colace, the Ninth Circuit reversed an aberrant conduct departure where the defendant had committed 12 separate bank robberies over a two month period. In United States v. Green, 105 F.3d 1321 (9th Cir. 1997), the court similarly reversed an aberrant conduct departure where the defendant had been engaged in a well-planned marijuana for profit operation that lasted several months.

The November, 2000, amendments to the Sentencing Guidelines reject the "totality of the circumstances" approach to a departure for "aberrant" conduct. See Supplement to Appendix C, Amendment 603. Guideline 5K2.20 expressly recognizes aberrant conduct as a viable basis for a downward departure, but limits its application to expressly EXCLUDE offenses that involve: (1) serious bodily injury or death (which effectively overrules Working in which the court upheld a downward departure in an attempted murder case involving two estranged spouses); (2) the discharge or use of a firearm (which effectively overrules Fairless, an armed bank robber); (3) "serious" drug trafficking; (4) a defendant with more than one criminal history point; or (5) a defendant with any prior federal or state felony convictions even if they are not countable under Chapter 4.

E. Immigration Status

Detrimental collateral consequences of a conviction premised upon a defendant's status as a deportable alien MAY constitute a viable basis for a downward departure IF the court finds facts in a particular case that constitute a deviation from the "heartland," of similar cases. United States v. Charry Cubillos, 91 F.3d 1342 (9th Cir. 1996) (possible departure basis as applied to an 841(a)(1) drug trafficking offense); see also United States v. Davoudi, 172 F.3d 1130 (9th Cir. 1999) (same as applied to a fraudulent bank statement offense under 18 USC § 1014); But See United States v. Martinez-Ramos, 184 F.3d 1055, 1057 (9th Cir. 1999)(detrimental collateral consequences are intrinsic to an offense in which a defendant's deportable status is an element of the offense (e.g. 8 USC §§1325, 1326) and thus, the court may NOT consider such factors relative to a downward departure). Previous incarceration as an immigration detainee may also justify a downward departure. United States v. Camejo, 333 F.3d 669 (6th Cir. 2003).

The fact that a defendant is deportable following his conviction is NOT a valid basis for a downward departure. United States v. Lipman, 133 F.3d 726, 731 (9th Cir. 1998).

In any event, a defendant's stipulation to deportation may constitute a viable basis for a downward departure, regardless of the nature of the underlying offense. United States v. Rodriguez-Lopez, 198 F.3d 773 (9th Cir. 1999).[20]

[20] The court declined to reach the question of whether the defendant must have had a colorable defense to deportation in order to rely upon such a stipulation as justification for a

Cultural assimilation is a viable basis for a downward departure in extraordinary circumstances. See e.g. United States v. Lipman, 133 F.3d 726 (9th Cir. 1998) (district court could depart downward in illegal re-entry case for defendant who resided in U.S. for 23 years, married a U.S. citizen and fathered several children who were also U.S. citizens).

In illegal re-entry cases, the court may consider a downward departure based upon the nature and circumstances of the underlying aggravated felony leading to a 16 level increase under USSG 2L1.2(b)(1)(A). United States v. Sanchez-Rodriguez, 161 F.3d 556 (9th Cir. 1998).

Sentencing disparity in illegal re-entry cases arising from different charging and plea bargaining policies of different U.S. Attorneys is not a proper basis for a downward departure. United States v. Banuelos-Rodriguez, 215 F.3d 969 (9th Cir. 2000) (en banc).

F. Post-Offense Rehabilitation

Post-conviction rehabilitation is a viable basis for a downward departure. See United States v. Hock, 172 F.3d 676, 681 (9th Cir. 1999). Such efforts must still be "extraordinary" since the Guidelines have already accounted for post-offense rehabilitation under acceptance of responsibility, 3E1.1, note 1(g). See also United States v. Thompson, 315 F.3d 1071, 1077 (9th Cir. 2002) (reversing district court's departure based upon defendant's anticipated successful treatment efforts absent finding that facts were extraordinary or outside of heartland for similar offenses).

However, post-sentencing rehabilitation (i.e. resentencing on remand following an appeal) is NOT a viable basis for a downward departure for acts occurring AFTER the November 1, 2000 Amendment, USSG 5K2.19. The law in the Ninth Circuit PRIOR to this amendment allowed for such a departure. United States v. Green, 152 F.3d 1202 (9th Cir. 1998). The Green decision was expressly rejected by the Sentencing Commission. However, nothing in the 2000 amendment was designed to restrict the court's ability to consider post-offense rehabilitative efforts. USSG Appendix C, amendment 602 ("[t]his amendment does not restrict departures based on extraordinary rehabilitative efforts prior to sentencing").

G. Criminal History Overstatement: 4A1.3

Where horizontal departures (to the criminal history score) are proper, the court cannot substitute vertical departures (offense level) for them. United States v. Canon, 66 F.3d

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departure, since the government raised this argument on appeal, but failed to raise the issue before the district court. Rodriguez-Lopez, 198 F.3d at 776, n.1, 777.

1073, 1079 (9th Cir. 1995).

If a court makes a downward departure under 4A1.3 to a criminal history category I, the court may not then rely upon the safety valve to sentence a defendant below a statutory mandatory minimum. United States v. Lawrence, 916 F.2d 553, 555 (9th Cir. 1990). If the defendant has more than 1 criminal history point, 18 U.S.C. Sec. 3553 precludes any departure below the mandatory minimum. United States v. Valencia-Andrade, 72 F.3d 770 (9th Cir. 1995).

Likelihood of recidivism supports an upward departure under 4A1.3. United States v. Connelly, 156 F.3d 978, 985 (9th Cir. 1998).[21]

The court also has the authority to depart downward from a career offender enhancement based upon the relatively benign nature of the defendant's prior offenses if the effect of those prior convictions over-represent the seriousness of the defendant's criminal history. United States v. Reyes, 8 F.3d 1379 (9th Cir. 1993); see also United States v. Sanchez-Rodriguez, 161 F.3d 556 (9th Cir. 1998) (recognizing departure based upon nature of underlying felonies).

Protect Act Amendments: The court may not depart below a Criminal History Category I, nor may it make any departure for criminal history if the defendant qualifies as an armed career criminal or a repeat dangerous sex offender. Those defendants who qualify as Career Offenders (under 4B1.1) may still seek a departure on this basis, but any departure may not exceed one category. The amendments also adopt the holding of Lawrence relative to the availability of safety valve relief following a criminal history departure.

H. Sentencing Disparity

A downward departure to "equalize" sentencing disparity may be justified "under the appropriate circumstances." United States v. Daas, 198 F.3d 1167, 1180-81 (9th Cir. 1999), cert. denied, 121 S. Ct. 498 (2000). The Ninth Circuit has not expressly identified what those circumstances might be. However, in United States v. Caperna, 251 F.3d 827, 831 (9th Cir. 2001), the court held that a sentencing judge may not depart on the basis of sentencing disparity unless the co-defendant is actually convicted of the same offense. The court found that this holding was mandated following its earlier decision in United States v. Banuelos-Rodriguez, 215 F.3d 969, 977-78 (9th Cir. 2000) (en banc) holding that a district court could not depart downward on the basis of differing charging policies of various U.S. Attorney' offices. The court expressly left to the discretion of the

[21] However, a low likelihood of recidivism is not a proper consideration for a downward departure because this is a factor already taken into consideration in the Guidelines. United States v. Working, 287 F.3d 801, 808 (9th Cir. 2002).

sentencing judge whether it would be appropriate to equalize sentences among cooperating and non-cooperating defendants. Caperna, 251 F.3d at 831-32.

I. Childhood Abuse

Extreme childhood abuse may present a viable basis for a downward departure. United States v. Rivera, 192 F.3d 81, 84 (2d Cir. 1999), cert. denied, 528 U.S. 1129 (2000); United States v. Pullen, 89 F.3d 368 (7th Cir. 1996); see also United States v. Roe, 976 F.2d 1216, 1218 (9th Cir. 1992) (in a case pre-dating 5H1.12, court found that significant childhood abuse could justify downward departure).

J. Extraordinary Family Circumstances

A sentencing court retains the discretion to make a downward departure based upon extraordinary family circumstances. United States v. Aguirre, 214 F.3d 1122 (9th Cir.), cert. denied, 531 U.S. 970 (2000). The court should consider any request within the context of other factors under 18 U.S.C. 3553(a) (e.g. likelihood of recidivism, aggravated nature of the offense, etc.): "[I]t is appropriate – indeed, essential – that the District Court consider the impact of a defendant's family circumstances on the purposes underlying sentencing." United States v. Dominguez, 296 F.3d 192 (3rd Cir. 2002) (affirming departure for first time offender who received no benefit for her participation in money laundering offense where she was sole caretaker for elderly, infirm parents); see also Aguirre, 214 F.3d 1122 (exceptional circumstances present where defendant's husband died and 8 year old son was left without a custodial parent).

Protect Act Amendment: The Application Note to USSG 5H1.6 now provides a list of factors that the court must consider prior to making a departure for extraordinary family circumstances. For claims that the defendant's incarceration will cause a loss of caretaking or financial support, the court must find that the defendant's role is "essential," and "irreplaceable," and that the proposed departure will "effectively" address these concerns. The Note emphasizes that any departure on this basis must be based upon a finding that the impacts upon family "substantially exceed" those normally attendant to incarceration.

K. Diminished Capacity: 5K2.13

The Ninth Circuit has held that if the court finds that any of the three factors outlined in the guidelines is present (i.e. voluntary intoxication, violence or a need for public protection), the court lacks the discretion to consider a downward departure for diminished capacity. United States v. Davis, 264 F.3d 813, 815 (9th Cir. 2001). Further, if the defendant suffers from a significantly reduced mental capacity, but is ineligible for relief under 5K2.13 (e.g. because of the voluntary use of drugs), the court may not look to 5K2.0 as an alternative basis for a departure to address the defendant's mental condition. United States v. Smith, 330 F.3d 1209, 1213 (9th Cir. 2003).

Whether an offense involves "violence" so as to preclude application of 5K2.13 should be determined on a case-by-case basis, examining the circumstances surrounding the offense. See e.g. United States v. Walter, 256 F.3d 891, 894-95 (9th Cir. 2001) (defendant convicted of sending threatening communications to the President could seek 5K2.13 departure because there was no evidence of any actual intent to harm); United States v. Pizzichiello, 272 F.3d 1232, 1238 (9th Cir. 2002) (relief under 5K2.13 unavailable where robbery involved actual violence), cert. denied, 123 S. Ct. 206 (2002). See also United States v. Dela Cruz, No. 03-10151 (9th Cir. Jan. 12, 2004) (defendant convicted of bomb threat ineligible for 5K2.13 departure where evidence supported finding that defendant intended his threat would "cause immediate disruption" to court proceeding).

Diminished capacity includes both mental and emotional ailments such as Post-traumatic Stress Disorder. United States v. Cantu, 12 F.3d 1506, 1511 (9th Cir. 1993). The fact that a defendant who suffers from such a disorder also abuses alcohol or drugs does not disqualify him from consideration under this section, so long as the mental or emotional condition played some part in the underlying offense. Id. at 1513-14. The extent to which the impairment contributed to the offense should determine the degree of departure, not the fact of departure. Id.

L. Susceptibility to Abuse in Prison

A defendant's stature, demeanor, naivete, lack of sophistication and the nature of the offense are valid departure considerations. United States v. Parish, 308 F.3d 1025 (9th Cir. 2002).

VI. MISCELLANEOUS - Recent Developments

A. "Aggravated Felonies" as applied to Illegal Re-Entry Cases under USSG 2L1.2(b)

If the state treats drug possession as a felony with a maximum potential term of more than 1 year, a drug possession conviction constitutes an aggravated felony. United States v. Arellano-Torres, 303 F.3d 1173 (9th Cir. 2002), cert. denied, 123 S. Ct. 1502 (2003); United States v. Soberanes, 318 F.3d 959 (9th Cir. 2003); see also United States v. Bellesteros-Ruiz, 319 F.3d 1101 (9th Cir. 2003) (Arizona drug possession conviction punishable up to one year was not an aggravated felony; court should also disregard § 844 treatment for repeat offenders for purposes of 2L1.2); But see, United States v. Rivera-Sanchez, 247 F.3d 905, 908 (9th Cir. 2001) (en banc) (California drug transportation conviction held not to constitute an aggravated felony in the absence of judicially noticeable facts establishing qualifying predicate); United States v. Pimentel-Flores, 339 F.3d 959 (9th Cir. 2003) (state assault conviction elevated to a felony by state sentencing enhancement does not qualify as an aggravated felony). However, a state law's characterization of a sentence as "rehabilitative" rather than punitive is "irrelevant," because federal law controls. United States v. Mendoza-Morales, 347 F.3d

772 (9th Cir. 2003); see also Pimentel-Flores, 339 F.3d 959 (2L1.2 application note definition of 'aggravated felony' controls over statute).

If the prior offense does not facially qualify as an aggravated felony, the court may consider the charging documents, plea agreement, a transcript of the plea proceeding or the judgment to determine whether the defendant pled guilty to the elements of a qualifying predicate. Arellano-Torres, 303 F.3d at 1177; see also United States v. Corona-Sanchez, 291 F.3d 1201, 1211 (9th Cir. 2002). The charging documents, standing alone, "are never sufficient." Arellano-Torres, 303 F.3d at 1177.

In computing the length of the prior aggravated felony, the court should include any prison sentence imposed after a probation revocation, United States v. Moreno-Cisneros, 319 F.3d 456 (9th Cir. 2003), or a sentence imposed as a condition of probation. United States v. Hernandez-Valdovinos, 2003 WL 22961337 (9th Cir. Dec. 17, 2003).

B. Prosecutor's Role at Sentencing

The government has an absolute duty to provide truthful and accurate information regarding the offense. Where facts as reflected in a PSR differ from facts anticipated in a plea agreement, the actual facts control and the government does not breach the plea agreement by providing those accurate facts. United States v. Maldonado, 215 F.3d 1046 (9th Cir. 2000). See also United States v. Camarillo-Tello, 236 F.3d 1024 (9th Cir. 2001) (government must fully inform court of basis for downward departure recommendation).

C. "Double Counting"

One part of the guidelines may not be used to enhance a sentence to account for a harm that has already been fully accounted for in another section of the guidelines. United States v. Herrera-Rojas, 243 F.3d 1139, 1144 (9th Cir. 2001). However, the same conduct may justify increases under more than one guideline provision "when one increase focuses solely on the defendant's conduct and the other focuses on the nature and degree of harm caused by the defendant's conduct." Id. at 1144-45. See also United States v. Parker, 136 F.3d 653, 654 (9th Cir. 1998); United States v. Wright, 891 F.2d 209 (9th Cir. 1989) (2-level enhancement under 4A1.1(d) for commission of offense while under sentence as applied to escape conviction did not result in impermissible double counting).

D. Fines - USSG 5E1.2

Defendant bears the burden of proving that he cannot pay a fine and his refusal to discuss his finances with a probation officer may be considered as a relevant factor. United States v. Brickey, 289 F.3d 1144, 1152 (9th Cir. 2002).

VII. SUPERVISED RELEASE

(a) Commencement

Supervised release generally commences upon a defendant's release from prison and runs concurrent with any term of parole imposed. 18 U.S.C. § 3624(e); United States v. Lynch, 114 F.3d 61, 64 (5th Cir. 1997); United States v. Reider, 103 F.3d 99 (10th Cir. 1996). An exception exists if the statute of conviction expressly mandates a consecutive supervised release term. United States v. Shorthouse, 7 F.3d 149 (9th Cir. 1993). A court may not impose consecutive supervised release terms for different offenses. See United States v. Sanders, 67 F.3d 855, 856 (9th Cir. 1995) (prohibited under 1994 Amendments to USSG 5G1.2); see also United States v. Alvarado, 201 F.3d 379 (5th Cir. 2000) (prohibited under 18 U.S.C. § 3624(e)). However, a defendant serving concurrent supervised release terms for different offenses may be subject to consecutive prison terms upon finding a violation of supervised release. United States v. Jackson, 176 F.3d 1175 (9th Cir. 1999).

(b) Conditions

A district court is authorized by 18 U.S.C. § 3583(d) to impose conditions of supervised release. This statute enumerates certain mandatory conditions of supervised release for federal offenders and permits a district court to impose any discretionary conditions of supervised release that "it considers to be appropriate," including those conditions listed in 18 U.S.C. § 3563(b)(1)- (10) and (b)(12)-(20). 18 U.S.C. § 3583(d) (2000). A discretionary condition, however, can only be imposed to the extent that it:

(1) is reasonably related to the factors set forth in § 3553(a);

(2) involves no greater deprivation of liberty than is reasonably necessary for the purposes set forth in § 3553(a); and

(3) is consistent with any pertinent policy statements issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a). Id.

Relevant factors set forth in 18 U.S.C. § 3553 include: (1) the nature and circumstances of the offense and the history and characteristics of the defendant; (2) the need for adequate deterrence to criminal conduct; (3) the need to protect the public from further crimes of the defendant; and (4) the need to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner. See also United States v. Jackson, 189 F.3d 820, 823 (9th Cir.1999); USSG § 5D1.3(b). Any such condition must "involve no greater deprivation of liberty than is reasonably necessary for the purposes set forth above." 5D1.3(b)(2). Further, the court must expressly find that any condition imposed be consistent with the

statutory goals outlined above; the court may not simply accept the parties' stipulation to a condition. United States v. Gross, 307 F.3d 1043 (9th Cir. 2002) (reversing district court's acceptance of stipulated release modification). Advance notice to a defendant of the court's intent to include special conditions is not required. United States v. Lopez, 258 F.3d 1053, 1055-56 (9th Cir. 2001), cert. denied, 535 U.S. 962 (2002). However, the court must give a defendant advance notice of any action that could adversely affect his sentence. United States v. T.M., 330 F.3d 1235 (9th Cir. 2003).

The district court has "broad discretion" in determining appropriate supervised release conditions designed to assist the defendant in transitioning successfully back into the community. Lopez, 258 F.3d at 1055-56. For example, in United States v. Lakatos, 241 F.3d 690 (9th Cir. 2001), the court affirmed the ability of a sentencing court to include a requirement that the defendant pay child support obligations, even though the underlying offense had nothing to do with the defendant's child support arrearage.[22] The Ninth Circuit has expressly held that "conditions of supervised release need not be related to each factor in § 3553(a) and may be unrelated to one or more factors, so long as they are sufficiently related to the others." United States v. Carter, 159 F.3d 397 (9th Cir. 1998). The "critical test is whether the challenged condition is sufficiently related to one or more of the permissible goals of supervised release." United States v. Brown, 235 F.3d 2, 6 (1st Cir. 2000).

The Ninth Circuit recently reversed a district court's imposition of supervised release conditions that were premised upon 20 and 40 year old allegations of sexual misconduct. T.M., 330 F.3d 1235. The court concluded that, in the absence of any evidence that the defendant engaged in similar misconduct in the twenty years preceding the federal offense at issue, such conditions bore no reasonable relationship to the goals of deterrence, public protection or rehabilitation. Id. In another recent decision, the court reversed the imposition of occupational restrictions where there was no connection between the offense conduct (a methamphetamine conspiracy) and defendant's job as a credit counselor. United States v. Britt, 332 F.3d 1229 (9th Cir. 2003).

(c) Revocation

Chapter 7 Policy Statements applicable to supervised release violations must be considered by the sentencing court, but are not guidelines that must be followed absent rigorous departure analysis. The Ninth Circuit affirmed a trial court's 21 month sentence which exceeded the Chapter 7 recommended range of 8-14 months. In so holding, the court specifically rejected a defense argument that certain "upward departure" language included in Application Note 3 to 7B1.4(a) served to "convert" this section into a guideline. United States v. Tadeo, 222 F.3d 623 (9th Cir. 2000).

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[22] The Ninth Circuit reversed the district court's order regarding child support only to the extent that it was inconsistent with a prior state court judgment.

Revocation of supervised release may be premised upon a defendant's failure to participate in mental health treatment, despite the defendant's claim that her mental illness prevented her from being able to carry out that condition of supervised release. United States v. Pinjuv, 218 F.3d 1125 (9th Cir. 2000). This holding should apply with equal force to defendants who violated the no drug use condition as well. The Ninth Circuit explained, "[R]evocation proceedings do not punish a defendant for a new offense. Instead they trigger the execution of the conditions of the original sentence for the offense of which the defendant has already been convicted." Id. at 1129. Accord Closs v. Weber, 238 F.3d 1018 (8th Cir. 2001) (parole revocation may be premised upon defendant's failure to take prescribed psychotropic medication).

Pursuant to 18 U.S.C. § 3583(g), there are three instances in which revocation is mandatory rather than discretionary: (1) where the defendant "possesses" a controlled substance; (2) if the defendant possesses a firearm; and (3) if the defendant refuses to comply with drug testing. According to United States v. Baclaan, 948 F.3d 628, 629 (9th Cir. 1991), drug use, as evidenced by a positive urinalysis may constitute evidence of possession. However, whether a particular defendant should be held to have possessed drugs through drug use is a matter within the sentencing judge's discretion. The guideline provision upon which the Ninth Circuit relied in Baclaan has been amended to expressly recognize that a court "shall" consider alternatives to incarceration under 3583(g) for a defendant who fails a drug test, considering the "availability of appropriate substance abuse programs, or a defendant's current or past participation in such programs." USSG Sec. 7B1.4, Application Notes 5 & 6.

The grade of violation for a drug possession charge or conviction is based upon the maximum term available under state or federal law, even if the state charges are ultimately dismissed. See United States v. Jolibois, 294 F.3d 1110 (9th Cir. 2002) (holding drug possession charge under Washington law constituted a Grade B violation, even though same charge would have been a Grade C violation under federal law).

(d) Reimposition of Supervised Release

Supervised release may be reimposed upon defendants who violate supervised release conditions in all revocation proceedings so long as the statutory criteria in 18 U.S.C. § 3583(e)(3) or § 3583(h) are met. Johnson v. United States, 529 U.S. 694 (2000). There is no limit on the number of terms of supervised release that may be imposed following revocation and time served on an initial supervised release term is not counted towards the statutory maximum. United States v. Cade, 236 F.3d 463, 465 (9th Cir. 2000). Thus, a defendant who repeatedly violates the conditions of his supervised release, may cumulatively serve a greater time on supervised release than the statutory maximum supervised release term. Id.